

REGULATING SEX WORK: UNITED STATES' POLICY AND INTERNATIONAL COMPARISONS

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ABSTRACT

This thesis examines the issues with current United States' sex work policies and considers peer countries' policies as potential alternatives by surveying existing research and utilizing case studies. Specifically, this thesis analyzes how American sex work policy restricts bodily autonomy, creates dangerous markets, and hinders efforts to deter sex trafficking. As policy alternatives, this study evaluates German and Swedish policies. German policy provides an example of a fully legalized and regulated sex market, where the buying and selling of sex are legally protected. The study on Swedish policy provides an example of the "Nordic Model," where the buying of sex is criminalized but the selling of sex is legal. This thesis concludes that, as a policy alternative, the "Nordic Model" could better suit the United States. Even after over a decade of legalization, Germany has failed to create practical regulations that protect sex workers. While the "Nordic Model" is not without issue, the alternative is most politically feasible and opens the door for collaboration between the government and at-risk workers.

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Chapter 1: Introduction

In 1908, Justice John Marshall Harlan of the United States Supreme Court described the lives of prostitutes, writing, “The lives and example of such persons are in hostility to the idea of the family as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony; the sure foundation of all that is stable and noble in our civilization; the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement” (*United States v. Bitty*, 1980). While Americans’ views regarding other previously taboo subjects have drastically changed over time, Justice Harlan’s degrading view of prostitution is still widely held and reflected in the law. Over the past half-century alone, broader understandings of personal autonomy have led to the legal protection of interracial marriage, homosexual activity, premarital access to birth control, and gay marriage, but prostitution remains criminalized. Due to laws disregarding sexual autonomy for prostitutes, sex workers are made particularly vulnerable to abuse and violence (Nussbaum, 1998).

Sex workers, especially female sex workers, are unnecessarily endangered and cannot safely access protection against threats or violence. Prostitutes who are raped, burglarized, or stalked face punishment if they seek the help of law enforcement, furthering their lack of legal protection of their bodily autonomy. If a woman offers sexual favors for money, law enforcement often disregards accusations of rape, holding

that once prostitutes offer sex for money, they have no claim to their bodies (Arax, 1986). The manner in which prostitutes are treated under prohibition offers them little right to their own bodies: sex workers are not given the legal choice to use their bodies freely, and when prostitutes face violence, they are left without protection. In general, prostitutes in America do not even report violence because doing so could likely lead to their own arrests (Reisenwitz, 2016).

Although supporters of the prohibition of prostitution claim that banning prostitution helps protect vulnerable women, the ban does little to stop problems associated with prostitution (Hayes-Smith & Shekarkharb, 2010). Research estimates that between 40 and 85 percent of prostitutes are drug users (“Sexual Exploitation,” n.d.): many rely on prostitution to finance a drug habit or use drugs as a coping mechanism for the violence they face in the sex market. Many prostitutes in America are victims of some sort, whether a victim of violence, drug addiction, or sex trafficking, but instead of providing outlets for abused sex workers to receive legal help, the United States prosecutes those who are involved in prostitution.

Because of the practical problems posed by criminalization of prostitution, especially due to the threat prohibition poses to female prostitutes, many of the United States’ peer countries have legalized or decriminalized prostitution. Countries such as Germany and Australia have legalized and regulate prostitution in an attempt to protect sex workers while recognizing the right to bodily autonomy in work. Other countries, such as Sweden and Denmark, have decriminalized prostitution while criminalizing soliciting prostitution. While these peer countries have more progressive prostitution

policies, prostitution remains illegal and fully criminalized in every part of the United States apart from some counties in Nevada.

In order to analyze the issues in the current system of American prostitution law and ways that policies should be adjusted, this thesis will begin with a review of existing literature regarding sex work. The literature reviewed will clarify some of the key considerations in sex work law, philosophical arguments regarding bodily autonomy and feminist theory, and the challenges associated with policymaking.

To establish the relevance of this thesis, Chapter 2 will describe the existing problems with the United States' prohibition on prostitution. This chapter will describe the various downfalls to total prohibition, specifically which groups suffer under the current American model. Chapter 4 will then discuss the Supreme Court's decisions regarding sexual autonomy to consider legal arguments for the decriminalization of prostitution.

Chapters 5 and 6 look at alternative international models for sex work in Germany and Sweden. The German case study analyzes the results of the full decriminalization of sex work in 2002 and the significance of regulations enacted in 2017 while the Swedish case study considers the impacts of only punishing the buyers of sexual services. Considering the consequences of these countries' policies is helpful for understanding the breadth of the issues concerning sex work policies.

Last, Chapter 7 considers possible policy recommendations for the United States based on the information studied. It is clear throughout the case studies that there is currently no sex work policy solution that is free of criticism and perceived negative

consequences. However, the literature and case studies do suggest that the current total prohibition is insufficient compared to other approaches.

Before beginning, it is necessary to define several key terms. First, prostitution is broadly defined as a person engaging in sexual activity in exchange for monetary payment or other forms of compensation. While the term prostitution typically refers to the buying and selling of specific sexual activity (sexual intercourse, fellation, etc.), the term falls under the broader category of “sex work,” which refers to a variety of activities, many of which are legal, such as stripping, performing in pornography, or engaging in telephone sex. This paper will focus on prostitution specifically, but the term sex work is commonly used interchangeably in literature. In reference to prostitution, a solicitor is someone who seeks a prostitute and offers compensation for sexual acts.

The most common forms of prostitution are identified by sociologist Ronald Weitzer in his book *Legalizing Prostitution: From Illicit Vice to Lawful Business* as: call girl/escort, escort agency employee, brothel employee, window worker, bar or casino worker, and streetwalker (Fuchs, 2013). Independent escorts or call girls do not work for a company and typically charge high prices. Agency employees also typically make higher wages compared to other prostitutes but share a portion with their agencies. Brothel employees work in designated locations where they are required to share their wages. These workers do not report making as much as escorts. Window workers are prostitutes who work in the windows of brothels or clubs, especially in cities like Amsterdam. Bar or casino workers approach men in bars in order to initiate the sale. Streetwalkers are particularly vulnerable to exploitation and make very little money by working from city streets (Weitzer, 2012).

Most policies either criminalize, decriminalize, or legalize prostitution; the technical differences create distinct policies. Criminalization makes the act of prostitution or soliciting a prostitute illegal and punishable under the law. Punishments vary by state, but in every U.S. state except Nevada, prostitution is criminalized. Decriminalization makes the act of prostitution not punishable by law but also not protected or regulated. The “Nordic Model” refers to a system where the selling of sex is legal but the purchase of sex is criminalized. Full legalization makes the act of soliciting a prostitute and the act of prostitution legal and protected under the law. Generally, legalization comes with regulations. As opposed to decriminalization, legalization creates laws that protect and regulate the practice of prostitution.

Chapter 2: Literature Review

1. Broad Overview

In the 2010 article, “Why is Prostitution Criminalized? An Alternative Viewpoint on the Construction of Sex Work” by Rebecca Hayes-Smith and Zahra Shekarkharb, the authors examine United States’ laws against prostitution as a possible “legal fiction,” analyze the critical assumptions underlying anti-prostitution laws, and consider alternative constructions for prostitution laws.

A legal fiction, as defined by *Black’s Law Dictionary* is “an assumption that something is true even though it may appear to be untrue. . . specifically a device by which a legal rule or institution is diverted from its original purpose to accomplish indirectly some other object” (Hayes Smith and Shekarkharb, 2010, p. 43). The authors argue that criminalized prostitution, one of the oldest “victimless” crimes, relies on assumptions that cannot be proved, thus making the law a “legal fiction.” In the United States, prostitution laws make the practice a crime against public order, but the authors criticize the effectiveness of these laws.

Before analyzing the laws’ effectiveness, the authors examine the laws’ underlying assumptions. The first assumption is that criminalization will “deter the soliciting of such services” (Hayes Smith and Shekarkharb, 2010, p. 44). The second assumption is that prostitution contributes to the spread of sexually transmitted diseases. After the First World War, the United States closed many Red Light districts to protect

military men from contracting STDs. Before this time, the rhetoric surrounding anti-prostitution policies was moral, not practical. Since then, there has been a greater focus on protecting public health. The third assumption is that “prostitutes are in a vulnerable position and therefore have a higher risk of being violently victimized,” and the fourth that “prostitution creates social disorder in the community” (Hayes Smith and Shekarkharb, 2010, p. 44).

In their examination of the deterrent assumption, the authors conclude that the legal prohibition actually does little to stop the behavior. Despite the potential punishments for engaging in it, a person could still rationally choose to engage in prostitution for the immediate benefits it may present. Further, there is little empirical evidence backing the assumption that criminalizing prostitution actually decreases the number engaged in it.

The second underlying assumption for prostitution laws is that criminalizing prostitution hinders the spread of sexually transmitted diseases. This purpose initially rose after World War I as STDs became more feared to impact young soldiers and has more recently focused on fear of the spread of AIDS. The authors conclude that, though the fear of spreading STDs may be valid, criminalizing prostitution does little to inhibit their spread. If anything, legalization coupled with proper regulations could actually reduce the spread of STDs through mandatory safety measures.

The third assumption of the current laws, that prostitutes have a higher risk of being victimized, is also not solved by criminalization. The authors argue that prostitutes

are exposed to greater threat because the market is illegal and thus less protected from violence. Last, the assumption that prostitution disrupts community order is also highly questionable. The authors point out that criminalization leads to increased police crackdowns that in turn lead to an increase in riskier behavior while engaging in prostitution; by criminalizing prostitution, a black market is encouraged. This black market co-exists with other illegal markets, particularly the drug market, and just as those involved in the drug market avoid reporting violence or robbery, those involved in the sex market avoid police contact, too.

After analyzing the current assumptions, the authors examine who benefits under the current system of prostitution policy: They argue that mainly the wealthy and politically powerful benefit. Politicians attempting to appear tough on crime have advocated for harsher crackdowns on prostitution to benefit themselves politically. Further, these crackdowns lead to more arrests of street prostitutes very few “call girls”—those with more wealthy clients—are arrested.

Along with who benefits under the laws, the authors also highlight who is hurt. Prostitution is often referred to as a victimless crime, but the authors suggest that the victims of prostitution are prostitutes themselves. Whether financial or social pressures lead one to engage in prostitution, the authors argue that those so engaged are likely to be victim to some hardship and exploitation.

Lastly, the authors argue for alternative constructions of prostitution policy. The authors prioritize the goal of protecting public health and argue that legalization would best meet this goal. Legalizing prostitution would open the door to regulations designed to hinder the spread of STDs through prostitution. Additionally, prostitutes would be

better able to report crimes committed against them, creating a safer environment for all. These changes would benefit prostitutes instead of benefiting the upper class and politicians who use harsh punishments for prostitution as campaign tools.

This article points out many flaws in the current construction of prostitution laws that I will highlight and discuss further throughout my thesis. The idea that criminalizing prostitution has a positive impact on stopping crime is shown to be questionable throughout this article, and I will further examine this idea throughout my work. As the article points out, it is noteworthy that current laws mainly serve to punish street prostitutes as opposed to call girls with higher class clients.

2. The Human Right to Bodily Autonomy

The issue of personal autonomy is crucial in understanding why the right to prostitution should be protected. David A. J. Richards uses the value of personal autonomy to frame his argument for the decriminalization of prostitution published in the *University of Pennsylvania Law Review* in 1979, writing,

To think of persons as possessing human rights is to commit oneself to two crucial normative assumptions: first, that persons have the capacity to be autonomous, and second, that persons are entitled, as persons, to equal concern and respect in exercising that capacity there is no form of sexual expression that can be given preferred status, for a large and indeterminate class of forms of sexual intercourse is compatible with autonomous self-respect. (p. 1224)

Richards explains that ensuring human rights necessitates the respect and equal protection of self-autonomy, including sexual autonomy. For acts of consensual sexual relations between adults, no sexual act should be given legally preferred status or

outlawed, because humans have the right to sexual autonomy. This understanding of human rights can illustrate why bans on certain sexual acts, including bans on prostitution, are unjust.

Richards analyzes the reasons throughout history that prostitution has been stigmatized or criminalized. One of the largest moral arguments he raises is that prostitution puts romantic love at risk. The American ideal of marriage and romance holds strong on American imagination, and prostitution directly conflicts with these ideals. Richards argues, however, that allowing these ideals to control and punish the practice of prostitution is to impose unfair standards on those who deviate from societal expectations.

Because Richards believes autonomy includes bodily or sexual autonomy, he believes the option to engage in prostitution should be open to those who are capable of choosing it. To clarify, Richards explains that the principle of sexual autonomy cannot be applied to children or those unable to consent. He also emphasizes that though engaging in prostitution should be considered a moral right there are no grounds to argue that the choice is wise or desirable for all. The idea, according to Richards, should be upheld but not imposed.

Richards' arguments for bodily autonomy are significant for development of my arguments regarding constitutional law. His ideas are similar those that led the Supreme Court to rule against anti-sodomy laws in *Lawrence v. Texas*. Sexual autonomy has been validated through other societal norms and continues to be further recognized in law, but these rights have not yet been extended to the choice to engage in sex work.

3. Feminist Philosophy

In the article “‘Whether From Reason or Prejudice’: Taking Money For Bodily Services,” the feminist philosopher Martha C. Nussbaum discusses the stigmas associated with sexual “commodification,” specifically focusing on the stigma attached to the work of prostitution. To allow a fruitful debate about the legality and morality of prostitution, Nussbaum argues, a broad analysis of society’s beliefs regarding taking pay for bodily services and a better awareness of the work options available to working class women is necessary. Considering the irrational basis of stigmas associated with accepting pay for bodily work, Nussbaum concludes that the legalization and morality of prostitution is best viewed through the lens of available “employment opportunities for working women and their control over the conditions of their employment” (Nussbaum, 1998, p. 696). Because legal and regulated prostitution would open and legitimize more work choice for women, it could have positive results.

In her analysis of stigmas associated with taking money for bodily services, Nussbaum reviews several work options. For example, Nussbaum discusses the work of someone employed by a chicken factory. In comparison, a prostitute can work fewer hours and have greater control over those hours. Both jobs have health risks, but those in prostitution may be substantially alleviated through regulation. A factory worker, by contrast, faces significant risk of permanent nerve damage to the hands even with regulations. The factory worker does not, however, face social stigmas and shaming to the extent prostitutes do. Further, the fact that a factory worker’s body is not invaded does not fully account for the difference in stigma for pay: “patient actors” can undergo colon or pelvic examinations for pay without prostitutes’ level of stigmatization (p. 706).

Out of all professions that use the body to varying degree, stigmas are still different when the body is used for sexual purposes. To understand why, Nussbaum lays out two primary factors: that prostitution is considered immoral and that it reinforces gender hierarchy, “the ideas that women and their sexuality are in need of male domination and control, and the related idea that women should be available to men to provide an outlet to their sexual desire” (p. 707). Nussbaum considers the morality concern to be insufficient due to the fact that other acts considered sexually immoral would never be made illegal. For instance, while sex outside of marriage is considered immoral by many throughout the United States, a policy criminalizing the behavior is not in place.

The more important of the two concerns, then, is the concern that prostitution perpetuates a system of gender hierarchy and oppression. Nussbaum counters this concern with the claim that repressing women’s sexuality is ultimately a greater contributor to such oppression. To control female sexuality for the sake of stopping gender oppression is thus self-defeating, as the control rests on the idea that women cannot have control over their sexual choices. The belief that sexuality must be controlled boils down to the view that “women are essentially immoral and dangerous and will be kept in control by men only if men carefully engineer things so that they do not get out of bounds” (p. 709). Thus, Nussbaum concludes that the historical context of stigmatized prostitution boil down to a fear of “women’s unfettered sexuality” (p. 710).

In conclusion, Nussbaum argues that the stigmas attached to the work of prostitution are unfounded rationally. The problems associated with prostitution are not unique to it. The working options of working class women are limited and all involve

risks or disadvantages to varying degrees. The focus, then, should shift from banning prostitution to ensuring women have more work options and more financial protection.

Nussbaum's work sheds light on important considerations regarding the stigmas associated with prostitution. By pointing out the double standard between prostitution and other forms of work that use the body, she offers a unique perspective. With her arguments in mind, it is important to consider how societies that have legalized prostitution attempt to keep adequate avenues of work choice open to vulnerable women. The option to pursue prostitution should be open, but proper regulations and resources to keep women's work opportunities open should also be pursued.

4. Prostitution and Policy Making

Although issues associated with prostitution and sex trafficking are continually changing, policy regarding these issues for the most part has remained unchanged. Hendrik Wagenaar and Sietske Altink (2012) discuss reasons for this lack of policy change in "Prostitution as Morality Politics or Why It Is Exceedingly Difficult To Design and Sustain Effective Prostitution Policy." In order to effectively advocate for a change in our current policies, it is necessary to understand why prostitution policies are particularly stagnant.

The article defines prostitution policy as "morality politics" and considers three issues regarding the creation of prostitution policy: the lack of precise data, confusions surrounding the design of prostitution policy, and problems with implementing policy. Using qualitative and quantitative data, the authors compare prostitution policy in Austria and the Netherlands.

The authors categorize prostitution policy as morality politics. They define morality politics as “[policies] driven by explicit ideology, almost exclusively owned by the general public, impervious to facts, discussed in emotionally highly charged language, concerned more with the symbolism of heroic measures than the details of implementation, and prone to sudden policy reversals” (p. 285). Morality politics pose particular difficulties for policy making because policymakers and the public are less willing to compromise on policies believed to reflect underlying societal moral values.

Next the authors discuss the challenges of collecting reliable data on prostitution. Counting the number of people involved in prostitution per area is extremely difficult. Sex workers have extremely high mobility rates. The authors tried but could not even accurately determine the number of window prostitutes in a given area. Further, little funding has been available to support high quality fact collection, in part because morality politics focuses more on ideology than facts.

Last, the authors argue that prostitution policy should primarily be discussed in terms of policy implementation, for two reasons. One, it would force a shift in focus to collecting empirical data regarding sex work, and two, it would facilitate greater discussion between society and sex workers. Sex workers’ experiences and opinions should be paramount in creating public policy regarding prostitution, and the authors believe there has been inadequate attention given to understanding sex workers’ actual experiences.

Although the study on the rate of street prostitution in this research is inconclusive, the authors’ overall points are important to my study. It is important to keep

in mind that data on prostitution is particularly hard to come by and that issues regarding implementation of prostitution policy should never be an afterthought.

Chapter 3: Existing Problems of Prohibition in the U.S.

The reality is that regardless of legality or criminalization of prostitution, the sex industry thrives; in the United States, the industry exists in all major cities, not just the rare county in Nevada where it is legal. A study conducted in 2016 by the Urban Institute illustrates how lucrative the underground sex market is. The research estimates revenue ranging from \$39.9 million to \$290 million in major cities such as Atlanta, Dallas, Denver, Miami, San Diego, Seattle, and Washington, DC (Johnson & Dank, 2016). There are an estimated one million prostitutes in the United States; some have been forced into the market through human trafficking, others entering voluntarily. Unfortunately, prostitutes who enter the market either by force or voluntarily face little to no protection from abuse or access to disease prevention due to the threats prostitutes face from law enforcement.

The most recent data available from the U.S. Department of Justice shows that in 2010, 62,670 people were arrested for prostitution and commercialized vice. Of those arrests, 19,480 were male and 43,190 were female. Juveniles under the age of 18 made up 1,040 of the arrests, while adults over the age of 18 made the remaining 61,630 arrests. The overall number of arrests for prostitution and commercialized vices has decreased by half since 1990, but the arrests for males have decreased at a quicker rate than arrests for females (Snyder, 2012).

One of the only federal laws explicitly regarding prostitution is a statute called the Mann Act, which “makes it a crime to transport a person in interstate or foreign

commerce for the purpose of prostitution or for any other immoral purpose”

(“Prostitution,” n.d.). Most state laws stipulate that offering sexual services in exchange for money is a misdemeanor punishable by fines and less than one year jail time. Most states also have laws punishing the solicitation of a prostitute and consider the crime a misdemeanor as long as the prostitute is over 18 years old (“Prostitution,” n.d.). If a prostitute is under 18, solicitation charges typically increase from misdemeanor to felony. However, studies suggest that soliciting sex from a minor typically results in little jail time. According to a 2014 study, in D.C. and Baltimore, the median actual time served for soliciting sex from a minor was 180 days, in Portland 14 days, and in Seattle, 88.5 days (Cassidy, 2014).

Similar to the underground drug trade, violence connected to sex work is heightened by its criminalization. Violent people have more ability to do harm and prey on sex workers, as they are not likely to be reported to the police. This often results in prostitutes relying on pimps for protection, which typically results in more violence (Reisenwitz, 2014). Prostitutes in countries where prostitution is illegal also are denied labor benefits and workers’ rights granted in legal jobs.

In addition to the problems faced by prostitutes who voluntarily work illegally, criminalization also creates a greater market for human sex trafficking. There are approximately twenty to thirty million victims of sex trafficking in the world and between 14,500 and 17,500 people are trafficked into the United States each year (Bales, 2013). The criminalization of prostitution provides traffickers a market where demand for prostitution is not matched with a legal supply. However, evidence suggests that legalizing prostitution can help squash the market for forced sex slaves. If there is a

supply of legal prostitutes available in a city or country, sex traffickers have less incentive to bring sex slaves there as the value of sex slaves is lowered. For example, in Germany there has been a ten percent decrease in cases of sex-based human trafficking since the legalization of prostitution (Reisenwitz, 2016).

As well as having the potential to deter sex trafficking, legalization has generated positive results in the way prostitutes feel protected in the workplace. After studying brothels for more than fifteen years in an area in Nevada where prostitution is legal, Barbara G. Brents of the University of Nevada, found that

Of the brothel workers we surveyed, 84 percent said that their job felt safe.

Workers report that they felt safe largely because the police, employers, and co-workers were there to protect them [. . .] employees report that they [. . .] are free to come and go and are bound only by their contract. (para. 2)

These policies have also shown favorable results in regards to improving public health and fighting the spread of STDs. Thus, the World Health Organization recommends legalization as “Violence against sex workers is associated with inconsistent condom use or lack of condom use, and with increased risk of STI and HIV infection. Violence also prevents sex workers from accessing HIV information and services” (World Health Organization, 2013, p. 22). This violence and lack of access to information and services are greatly ameliorated through the legal protection of sex work.

Amnesty International has considered these results and called for the legalization of prostitution, stating,

We have seen evidence to suggest that the criminalization of sex work leads to social marginalization and an increased risk of human rights abuses against sex

workers. The evidence also suggests that decriminalization could be the best means to protect the rights of sex workers and ensure that these individuals receive adequate medical care, legal assistance and police protection. (para. 9)

The problems that currently exist in the underground sex market pose a greater risk to sex workers and legalization has shown positive results in other countries. With legalization, sex workers can have better control of their physical health by having better access to testing and of their mental health by having support from law enforcement against potential abuse.

In the 1999 article “For Their Own Good: The Results of the Prostitution Laws as Enforced by Cops, Politician and Judges,” the president of International Sex Worker Foundation for Art, Culture, and Education, Norma Jean Almodovar argues that

We also believe that laws against prostitution are meant to protect basic human rights and to preserve our dignity. Are they not for our own good, to prevent all women from being exploited? I argue that rather than meeting these goals, prostitution laws actually serve to further the exploitation of women, and therefore should be repealed. As long as prostitution laws remain, prostitutes will continue to be marginalized from mainstream society. Their needs will be ignored and brutality against them will be rationalized or even condoned. The stigmatization that goes along with prostitution laws strip these women of their rights. Even those who take an oath to protect all citizens see the prostitute as undeserving of rights that are supposedly guaranteed to all people. (p. 120)

In the current state of affairs, areas where prostitution is illegal results in greater risk for vulnerable members of society participating in the underground sex market. Prostitutes

who voluntarily enter the market face violence from clients and pimps while lacking proper access to workers' rights and police protection. Areas of criminalization give sex traffickers valuable markets that contribute to greater numbers of victims of sex trafficking. Legalization can lead to regulations that can protect prostitutes and clients against the spread of venereal diseases and offer better legal protection against violence and abuse for prostitutes.

The United States should look to examples like the one set in Nevada. The Las Vegas Mayor defended the state's prostitution law

Because it recognizes prostitution as a reality and therefore functions to protect all the affected parties, as opposed to the other forty-nine states, which make a crime back legalized prostitution. Those include the acknowledgement that illegal prostitution is occurring and that brothels could provide safer, regulated and revenue-generating sex. (Novak, 2009, p. 153)

To summarize, the prohibition on prostitution creates increased danger for sex workers by forcing them to work in an underground market. These underground markets will continue to exist and prostitutes participating will continue to be denied workplace rights and adequate protection from law enforcement against abuse. Legalizing prostitution would better protect the right to sexual autonomy while enabling governments to regulate and monitor the sex work industry.

Chapter 4: Supreme Court Jurisprudence: Sexual Autonomy

Although the Supreme Court has never made a specific ruling on prostitution law standards, laws limiting personal freedoms by restricting sexual and bodily autonomy have been addressed. Most notably, the court legalized homosexual sodomy in their landmark decision *Lawrence v. Texas* in 2003. The plaintiff, John Lawrence, challenged a Texas law that allowed police to arrest him for engaging in homosexual activity. The court's ruling established that homosexual behavior between consenting adults is protected under the the Fourteenth Amendment's equal protection and due process clause. The court also established that laws promoting strictly moral goals cannot be upheld under review. The court's analysis of this case shows clear correlations between protecting homosexual behavior and legalizing prostitution.

1. *Lawrence v. Texas* Decision

As understandings of sexual privacy and autonomy shift, laws regulating non-procreative or non-marital sexual relationships have been challenged to better protect citizens' sexual rights. In the case of *Lawrence v. Texas*, the Supreme Court ruled that laws banning homosexual sodomy were unconstitutional by addressing the following three questions:

1. Whether petitioners' criminal convictions under the Texas "Homosexual Conduct" law—which criminalizes sexual intimacy by same-sex couples, but not identical behavior by different-sex couples—violate the Fourteenth Amendment guarantee of equal protection of the laws.

2. Whether petitioners' criminal convictions for adult consensual sexual intimacy in the home violate their vital interests in liberty and privacy protected by the Due Process Clause of the Fourteenth Amendment.
3. Whether *Bowers v. Hardwick*, supra, should be overruled? (*Lawrence v. Texas*, 2003)

The court's evaluation of the first two questions is particularly applicable when considering whether laws outlawing prostitution could potentially be considered unconstitutional.

The court addressed the first question of equal protection by examining the law's legitimacy under a rational basis review. Under the rational basis review, the court considered whether the law outlawing homosexual sodomy was rationally related to a "legitimate" government interest. The court ruled that, because the law was primarily in place to uphold a subjective moral ideal about homosexual behavior, the anti-sodomy law could not pass a rational basis review. As O'Connor wrote in her concurring opinion, "A law branding one class of persons as criminal based solely on the State's moral disapproval of that class and the conduct associated with that class runs contrary to the values of the Constitution and the Equal Protection Clause, under any standard of review" (*Lawrence v. Texas*, 2003). While previously courts considered concerns of morality as valid reasons for outlawing certain behavior, the Lawrence Court rejected this argument as a defense for the Texas law. The majority opinion established the fact that as history moves forward, truths become apparent, and principles shift, laws should likewise adjust with our new understandings. As Justice Kennedy wrote in the opinion of the court,

Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom. (*Lawrence v. Texas*, 2003)

The language of this opinion and the court's explicit distinction regarding moral goals make it clear that laws based solely on morality cannot pass a rational basis review.

Second, the court answered whether adult consensual sexual intimacy in the home is a protected liberty and privacy under the Due Process Clause of the Fourteenth Amendment. The majority opinion upheld the idea that laws should not restrict private sexual activity between consenting adults. Justice Kennedy wrote in the majority opinion that,

This, as a general rule, should counsel against attempts by the State, or a court, to define the meaning of the relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects. It suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons. When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. (*Lawrence v. Texas*, 2003)

The majority opinion upholds the idea that sexual activity between consenting adults should be protected against restrictive laws due to the recognition of sexual autonomy. This right was previously less well established, but the Supreme Court used precedent established in previous cases to establish this right.

Specifically, the case of *Planned Parenthood of Southeastern Pa. v. Casey* was quoted to help establish the right to sexual freedom for all adults regardless of marital status or sexual orientation, and thus to better explain the importance of personal autonomy in intimate decisions:

These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. (*Planned Parenthood of Southeastern Pa. v. Casey*, 1992)

Under the decision in *Lawrence*, laws outlawing sodomy conflicted with an individual's right to make choices regarding their own personal dignity and autonomy, and considering the court's decision to uphold the right of personal sexual autonomy between consenting adults and to explicitly exclude moral goals as legitimate reason to limit this autonomy, the precedent of this case could be applied to laws outlawing prostitution.

2. *Lawrence v. Texas* and Prostitution

With the decisions of *Lawrence v. Texas* in mind, the goal of equal protection under the law and protecting sexual activity between consenting adults can be applied to the argument for legalizing prostitution. There are a variety of ways anti-prostitution laws

threaten the equal protection clause of the 14th Amendment. As stated by the Supreme Court in *City of Cleburne v. Cleburne Living Center, Inc.* and referenced by the court in *Lawrence v. Texas*, the Equal Protection Clause “is essentially a direction that all persons similarly situated should be treated alike . . . legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest” (*City Of Cleburne V. Cleburne Living Center*, 1985). Under current anti-prostitution laws, female prostitutes are punished more frequently than solicitors while facing a greater threat of violence without protection from law enforcement. The reasoning behind laws banning prostitution often reflects moral ideals, which, as *Lawrence v. Texas* ruled, do not qualify as a legitimate government interest.

a. Disproportionate Punishment for Women

Although laws outlawing prostitution may appear neutral to gender, in practice they often disproportionately punish females for prostituting themselves (Reisenwitz, 2016). While approximately twenty percent of men solicit a prostitute at some point, for every eight prostitutes arrested only two male customers are arrested (Flowers, 1994). Often times male clients are asked to testify against the prostitute in order to have their charges dropped or reduced, reflecting society’s disdain towards prostitutes (Reisenwitz, 2016).

Charges also vary drastically between the solicitor and prostitute. While every state has laws which penalize prostitutes with fines ranging up to one thousand dollars and sentences ranging up to a year, not all states have laws that punish the solicitor, leaving the punishments to the discretion of a judge (Drexler, 1996). The way that laws criminalizing prostitution are framed enable judges to use a prostitute’s customer to

strengthen the case against the prostitute while allowing the customer to receive a lighter sentence. Because the prostitutes targeted and charged are overwhelmingly women, they face a variety of unequal protections both in the language of anti-prostitution laws and the manner the laws are practiced.

b. Moral Goals Inherent in Prohibition

The state's interest for criminalizing prostitution is in part related to ideals of morality and proper sexual behavior—specifically that sex ought to be confined to marriage at best or emotionally intimate relationships at least. The language and location of state statutes outlawing prostitution illustrate the fact that ideals of morality strongly influence anti-prostitution laws. This reality is illustrated in South Carolina's regulations against prostitution which appear in a chapter entitled "Offenses Against Morality and Decency," blatantly associating laws against prostitution to moral protections. Tennessee's anti-prostitution laws go further by imposing harsher sentences when prostitution is committed "within 100 feet of a church." It is clear that at least in part, the motivation behind anti-prostitution laws is to uphold a moral social order rooted in religious notions of sexuality and decency.

The law restricting commercial sexual behavior with the goal of promoting moral ideals is inherently inconsistent with the Supreme Court's ruling legalizing pornography. In the case *Miller v. California* the court ruled that pornography is protected under the First Amendment, stating "at a minimum, prurient, patently offensive depiction or description of sexual conduct must have serious literary, artistic, political, or scientific value to merit First Amendment protection" (*Miller V. California*, 1973). This ruling has been applied to protect most forms of pornography involving consenting, of age adults,

regardless of how explicit. The moral goals used to justify the prohibition on prostitution are not used to outlaw this other form of sexual activity in exchange for money, a truth that highlights the inherent inconsistency of the United States' treatment of sex workers. Under the current status quo, the performance of sexual activities in exchange for payment is perfectly legal so long as the exchange is recorded. *Lawrence v. Texas* clearly established that moral animus cannot be a justifiable reason for outlawing particular behavior, and considering legalization of pornography the intended moral goals of outlawing prostitution are not reasonably achievable.

c. Nonmoral State Goals Achieved by Prohibition

Similar to the motivation to outlaw consensual homosexual acts, the motivation for outlawing prostitution is first related to morality. However, just as nonmoral goals were cited as reason to criminalize homosexual behavior, nonmoral goals are cited as reason to criminalize prostitution. The Texas Republican Party's platform to uphold the state's antisodomy laws included both moral and nonmoral goals as it stated,

The Party believes that the practice of sodomy tears at the fabric of society, contributes to the breakdown of the family unit, and leads to the spread of dangerous, communicable diseases. Homosexual behavior is contrary to the fundamental, unchanging truths that have been ordained by God, recognized by our country's founders, and shared by the majority of Texans. (Garcia, 2005)

The laws outlawing sodomy were primarily motivated by moral reasoning, and the nonmoral goals of preventing the spread of disease were not achievable by outlawing homosexual activity. Anti-prostitution laws are inherently similar, as nonmoral goals to prevent the spread of disease are not actually achieved through outlawing prostitution.

The debate surrounding prostitution was moral in nature during the 18th century, and the argument for outlawing prostitution changed during the nineteenth century to include more medical reasoning. During World War I, the fear of STDs led the federal government to close red-light districts near military bases, considering prostitution as a moral and physical threat to military men (Hayes-Smith & Shekarkharb, 2010). This rhetoric has continued to be used as reasoning to criminalize prostitution.

These goals have been explicitly outlined in cases like *People v. Johnson*, a case from the Appellate Court of Illinois in which a prostitute challenged the state's anti-prostitution statute. In this case, the court outlines the state's interests as "preventing venereal disease, cutting down prostitution-related crimes of violence and theft, and protecting the integrity and stability of family life" (Garcia, 2005, p. 175). The court upheld the statute on the grounds that it was related to Illinois' legitimate goal of promoting public welfare. Therefore, the other possible goals of a state that should be considered are preventing STDs, deterring prostitution related crimes, and protecting family life. While preventing STDs and crime might be legitimate state interests, there is little evidence to show that laws outlawing prostitution help achieve these goals.

d. Preventing the Spread of STDs

The goal to prevent the spread of STDs, while reasonable, is outdated considering modern legalization models and access to preventative measures. When prostitution is legalized and regulated in a way that ensures STDs will not be spread, the rates of sexually transmitted diseases among prostitutes falls below national averages. In Nevada, for example, customers (or prostitutes) have been required to wear condoms since 1986. Prostitutes in Nevada have had compulsory monthly HIV testing since 1986 along with

standard sexually transmitted disease tests weekly. One study conducted by Dr. Gary Richwald, the director of Los Angeles County's sexually transmitted disease program, reported that no prostitute working at a brothel in Nevada has tested positive for HIV since 1986 (Baker, 1991). The medical screenings and condom requirements in the Nevada prostitution system make the threat of the spread of STDs extremely unlikely. Individuals are more likely to contract an STD through private sexual activity considering no screenings or condom use is required. Likewise, the underground prostitution market poses a far greater state risk for the spread of STDs as no regulation like Nevada's can be in place as long as prostitution remains illegal. Considering the fact that legal, regulated prostitution provides a far better way to prevent the spread of STDs, the state's interest is not achievable under laws which outlaw prostitution.

e. Preventing Crime

Another nonmoral intended goal of outlawing prostitution is to decrease crimes associated with prostitution—theft, sexual assault, and drug abuse. Similar to the goal of preventing the spread of STDs, the goal of decreasing crime is a legitimate state goal that is not achieved by outlawing prostitution. Instead, outlawing prostitution forces workers into an underground market where crime cannot be adequately reported. Similar to the underground drug market, victims of prostitution-related crimes are unlikely to seek police help. Unfortunately, the harm of the underground sex market disproportionately affects women. Considering the fact that female prostitutes are jailed at a far higher rate than their male customers or male prostitutes, they face a greater threat if they report a sexual assault or theft. Under laws that criminalize prostitution, if a prostitute is assaulted or robbed, she faces a great risk of being arrested that discourages her from reporting the

crime. These problems are illustrated in a 1999 decision by a Pasadena Superior Court judge who dismissed rape charges brought by a prostitute, saying,

[t]he law did not afford prostitutes protection against rape or sodomy if they had agreed to and were paid for a “lesser” sex act . . . [T]he man could force the prostitute to engage in sexual intercourse and sodomy without being criminally liable, as long as he didn't physically abuse her. A woman who goes out on the street and makes a whore out of herself opens herself up to anybody . . . She steps outside the protection of the law. That's a basic and fundamental legal concept . . . Who in the hell is going to believe a whore on the witness stand anyway? (Arax, 1986, para 6)

If prostitution was legal or decriminalized, prostitutes would have protection from these crimes without fear of arrest or denial of justice.

f. Protecting Family

The goal of protecting the stability of family life, which also can be considered a moral goal, also disproportionately burdens female prostitutes. The basic reasoning behind this intended goal is that sex ought to be reserved for marital relationships and prostitutes will threaten family life by tempting married men:

The court's reasoning that jailing sex workers will protect families requires these women to bear a burden not equally shared with their married customers. The argument that jailing a prostitute is justified to protect against a man's unfaithfulness to his wife explicitly lays the blame on prostitutes for the problems in America's marriages. Even if it is true—that the existence of prostitution leads

to infidelity—this concern is clearly a private matter and not an issue of public welfare, further demonstrating the underlying animus. (Garcia, 2005, p. 179)

As illustrated in the goal of preventing crime, the goal of protecting family life also unfairly burdens prostitutes, specifically those who are women.

3. Conclusion

As discussed in the literature review, the philosophical right to bodily autonomy could be extended to protect the right to commodify sexual activity. This right to bodily autonomy has not always been recognized by the Supreme Court of the United States, but as ideals have shifted regarding sexuality and bodily privacy, the Court has developed broader protections. The analysis in this chapter shows that an argument could be made that the right to sell sex consensually could be protected by Supreme Court jurisprudence. More importantly, the analysis shows the inherent inconsistencies in laws totally prohibiting sex work. These inconsistencies align well with the arguments made by Hayes-Smith and Shekarkharb regarding legal fiction. Prostitution policy in the United States rests on many unfounded notions regarding safety and moral protections.

Chapter 5: Case Study: Germany

1. Introduction

The legalization of prostitution comes with the challenge of regulating prostitution. The countries in Western Europe where prostitution is legal, particularly Germany, the Netherlands, and Austria, have all implemented policies that attempt to regulate sex work. These regulations range from mandatory health checks for sex workers to control of organized brothels. Germany officially legalized prostitution in 2002 and has enhanced regulations of the market over the past year. While Germany is not as conservative as the United States, it is more conservative compared to other countries in Europe where prostitution is legal. Therefore, to formulate policy recommendations for the United States, Germany's sex work policies are best to study.

2. Prostitution Act of 2002

Before 2002, the practice of prostitution in Germany had been tolerated, though not legally recognized, for the previous fifty years. Sex workers themselves were typically not prosecuted, although the promotion of prostitution through pimping or owning a brothel was illegal and commonly punished (Herter and Fem, 2017). Still, prostitutes had little legal protection and worked in a woefully unregulated industry. In 2002, however, Germany passed the Act Regulating the Legal Situation of Prostitutes (Prostitution Act of 2002), which fully legalized sex work and removed the label of the work as "immoral." According to the German Federal Ministry of Family Affairs, Senior Citizens, Women and Youth,

The aim of the introduction of the Prostitution Act in 2002 was to counteract previously existing legal disadvantages of prostitutes and to facilitate their social protection. At the same time, criminal liability for the promotion of prostitution or pimping was reduced to such an extent that brothel operators are no longer liable to prosecution simply because they want to create more favorable or safe working conditions for prostitutes. (“Prostitution Act,” 2017, para 3)

Additionally, according to the International Committee on the Rights of Sex Workers in Europe, the Prostitution Act had the “Aim of improving the legal position of prostitutes as service providers and enabling sex workers to sue for payment and get statutory health insurance” (Herter and Fem, 2017, para. 3). The Prostitution Act of 2002 gave sex workers access to government benefits they had been previously denied, particularly health insurance. The legal recognition of prostitution also opened the doors for sex workers to more openly seek assistance in a situation of abuse or coercion. Though the policy brought sex workers needed recognition and benefits, since its passage, Germany’s policy has faced a variety of criticism and praise due to its lack of regulatory measures. The industry remained fairly unregulated until 2017, when a new the Prostitution Protection Act was passed.

3. Prostitution Protection Act of 2017

a. Reasons for Implementation

The German Federal Ministry of Family Affairs, Senior Citizens, Women and Youth (BMFSF) introduced the Prostitution Protection Act of 2017 in order to better regulate the sex work industry. While the bill’s stated goal was protecting prostitutes, the policy has been met with overwhelming criticism from sex worker advocates. The bill

mandates an array of restrictive regulations including sex worker registration, the disclosure of sexual transactions contracted prior to the date of the transaction, and a ban on prostitutes sleeping in the places where they do business. This drastic change in policy was brought on by a variety of factors, including fears of increased sex trafficking into Germany and an influx of immigrants from the expansion of the European Union (Herter and Fem, 2017).

During the passage of the 2002 Prostitution Act, there was already skepticism and dissent. For example, a licensing requirement for brothels was recommended, and police expressed concerns that the law lacked important regulations to make the industry safe. German police officer Heike Ruda stated “I can’t say whether the law might have scared off human traffickers if it had been fully implemented . . . The only thing we can say is that from the perspective of the police, the way things are going right now, this law hasn’t succeeded” (Overdorf, 2014, para 21). Trafficking concerns already present in 2002 were only heightened in 2004 when the Czech Republic, Cyprus, Estonia, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia, and Slovakia all joined the European Union. With the addition of those ten countries, Germany’s borders were opened to an influx of immigrants. Compared to other countries in the European Union, Germany’s policies were among the least restrictive for sex work, causing Germany to be a prime location for sex workers.

b. Implementation

Discussions for the Prostitute Protection Act of 2017 began as early as June 2014. The BMFSFJ invited experts on sex work policy to discuss “Regulation of the Prostitution Trade.” Groups of stakeholders, including sex worker groups, had the

opportunity to submit their comments and recommendations for policy changes. Based on those submissions and discussions, the *Law on the regulation of the prostitution industry and for the protection of persons working in prostitution* was drafted and submitted in August 2015 (Herter and Fem, 2017). The proposed legislation sought to “improve the situation and status of persons working in prostitution and to combat crime such as trafficking in human beings, violence against and exploitation of prostitution and pimping” (Herter and Fem, 2017, p. 20). The proposed legislation met criticism from various groups for fears that the law would hamper the rights and freedoms of those working in prostitution. However, a version of the bill was approved by the Bundestag on July 7, 2016, and went into effect on July 1, 2017.

The newest additions to Germany’s sex work laws cover a range of issues and face varying degrees of criticism. All of the regulations went into effect on July 1, 2017, but established sex workers were allotted a grace period of six months to comply with the new requirements. All sex workers entering the industry for the first time, however, are required to immediately comply.

c. Regulations

Unlike the Prostitution Act of 2002 which lacked much regulatory detail, the Prostitution Protection Act explains in detail new regulations. First, a sex worker must register to be a prostitute. These regulations apply to traditional prostitutes as well as erotic masseurs and professional dominatrixes. Workers who perform in pornography, or partake in webcam and phone businesses are not obligated to register. To register, workers must provide: a full name, a registered address, date of birth, nationality, work permit information, the area in which they plan to work, and two photographs. Sex

workers under the age of 21, but over the age of 18, must renew their registration yearly, and workers over 21 every two years. During the registration process, workers must receive counseling, especially on the dangers of sexually transmitted diseases. Workers are also informed of their rights to health insurance and counseling and obligations to pay taxes and use condoms (Herter and Fem, 2017).

Once registered, sex workers are issued an identification card. Without proper registration, sex workers will be charged a fine. The identification card includes: the preferred title of the worker (workers may provide their street names for identification cards), a photo, their birthdate and place of nationality, registered work area, expiration date, and where the identification card was issued. Workers are required to carry the identification with them at all times during their work. Registration cannot be completed if a worker does not complete consultations, does not submit all information, is under 18, is six weeks away from childbirth, or if there is reason to believe an applicant is being forced into sex work.

In addition to the regulations sex workers are required to comply with, brothel owner are also held to a variety of regulations. First, anyone operating or wishing to operate a prostitution business must apply for a permit to legally do so. The applicant's character is examined, and the structure where sex work will take place is inspected. The sex work facilities must have separate toilets, break rooms, and an emergency call system. Under the new regulation, workers cannot sleep at their place of work, so no apartment style brothels are allowed. Additionally, no permits will be given to brothels with certain business models, including flat-rate or gang-bang style brothels.

Brothel owners are held responsible for ensuring that only registered prostitutes

work in their businesses. If brothel owners allow unregistered workers, they will be fined, along with the workers. Those applying must also have written contracts regarding payment for sex workers, and are responsible for maintaining records of the business's operations, and must agree to allow inspectors and counselors onto their business premises ("Hydra," n.d.). Additionally, brothel owners must provide condoms and hygiene supplies.

d. Opinions of Act

Since the Prostitution Protection Act was passed and implemented, it has been met with substantial criticisms. It is feared that many sex workers will not register in order to maintain their privacy and suffer consequences if they are caught. Even sex workers who would prefer to register and adhere to policies may face challenges in providing all the information required for registration. Many sex workers in Germany are migrant workers who may not have access to the information required. Similarly, many sex workers do not stay in one area to work, and instead move around and cannot provide an accurate answer for where they plan to work. The policies restricting sex work to only take place in areas where workers do not sleep poses unique problems for low income sex workers, who rely on working and sleeping in the same place (Herter and Fem, 2017).

Amnesty International of Germany has criticized the law, as Maja Liebing, an Amnesty International women's rights expert, stated, "This law fails to protect sex workers, prostitutes and victims of human trafficking from human rights abuses . . . Although the respondents' respective objections have been heard, they are barely considered in the legislation" ("Prostituiertenschutzgesetz Schützt," 2016, para. 4). Amnesty International has previously stated their position on sex work, calling for the

decriminalization of sex work around the world. Along with Amnesty International, the following organizations jointly criticize the new law: Professional association erotic and sexual services eV, Federal Association Sexual Services (BSD) eV, Women's meeting Olga, Ban Ying Coordination and Counseling Center against Human Trafficking, HYDRA eV Meeting place and advice for prostitutes, ICRSE (International Committee on the Rights of Sex Workers in Europe), and bufas eV - alliance of counseling centers for sex workers.

4. Conclusion

With legalized sex work, Germany faces the fine line of implementing policies that protect sex workers and policies that over-regulate and force sex workers into an underground market. Although the German Federal Ministry for Family Affairs, Senior Citizens, Women and Youth attempted to take into consideration recommendations by sex worker groups, the policy they created clearly fell short of what best protects sex workers. The effects of this law will begin to come apparent over the next year, as sex workers are still in the “grace period” provided in the law.

Chapter 6: Case Study: Nordic Model

1. Introduction

Recently policymakers have paid increased attention to the Nordic Model of sex work regulation. Under this policy, sex work is neither fully criminalized nor fully legalized. Instead, countries protect the right to sell sexual services while criminalizing the actual purchase of sexual services. A variation of this approach is currently practiced in Sweden (since 1999), Finland (since 2006), Iceland (since 2007), Norway (since 2009), and Great Britain (since 2009). As the first country to specifically target demand, Sweden has served as an example for the rest of Europe and inspired the adoption of demand targeting policies in other countries. Because Sweden has had its policies for the longest time, the Nordic model is best analyzed by examining its effects in Sweden. In this chapter I will explain the history of the policy, the details of the laws, and the effects the policy has had on sex workers and sex trafficking. Additionally, I will consider Swedish public opinion regarding the policy.

2. History

Throughout the 1970s, the women's rights movement brought political attention to the practice of prostitution. The attention was furthered as a scandal regarding child prostitution in Sweden broke and eventually exposed prominent government leaders as purchasers of child sex. While prostitution was legal, the scandal caused leaders to re-evaluate the country's lax policies. The Swedish government opened an official inquiry on prostitution which ultimately described prostitution as a practice that suppressed the

Swedish ideals of gender equality and personal freedom. Still, prostitution was considered a social, not a criminal, problem for Sweden (Yttergren & Westerstrand, 2016). At this time, the right wing women in Parliament suggested criminalizing the purchase of sex, and in 1981 the cause was taken up by Sweden's Social Workers' Association. After the government issued an official inquiry, the Swedish Workers' Association proposed legislation for a law against purchasing sex, arguing the law would "improve equality between the sexes and prevent undue exploitation of socially deprived women" (Waltman, 2018, p. 5). Despite these organizations' efforts, the push to criminalize purchasers took over a decade to be enacted.

In 1993, the Swedish minister of social affairs began advocating for reform of sex work laws to criminalize the purchase of prostitution. The minister argued that "a prohibition would make it clear to the prostitutes' clients that prostitution is a phenomenon that society finds reprehensible" (Yttergren and Westerstrand, 2016, p. 47). Prostitution was again framed as an issue for society and as a threat to gender equality, and Parliament eventually passed the law criminalizing the purchase of sex in January 1, 1999.

3. Details of Laws

The Prohibition of Purchase of Sexual Services Act of 1999 criminalizes purchasing sexual services in any form, including street prostitution, brothel prostitution, and prostitution through escort services. The law also punishes those who procure sex workers through exploitation, or pimping. Individuals who promise compensation for sex, whether or not the compensation is actually provided, also can be punished. Finally,

the law bans human trafficking and lays out punishment for those involved in the trafficking of sex workers.

The Swedish law punishes those who purchase or attempt to purchase sexual services with a fine or prison sentences up to a maximum of six months (Claude, 2010). The Supreme Court of Sweden has set fifty days as the minimum jail time for purchasing sexual services. In cases with repeat offenders, buyers have been punished with up to 150 days in jail (Ekberg, 2004). While these punishments may seem light from the American perspective, Sweden does not allow any crime, even murder, to be punished with more than ten years in prison (Claude 2010).

The Swedish law not only punishes those who buy or attempt to buy sexual services, but also those who exploit someone or facilitate the selling of sexual services. The punishment for procurement, or pimping, is a maximum of four years in prison. Even when crimes are serious, wide-spread, or in relation to a larger network of pimping, the perpetrators typically receive two to six years of prison time (Ekberg, 2004).

Sweden punishes those involved in formal human trafficking the most of any culpable group involved in the purchase of sexual services. Sweden broadly defines trafficking, based on the Palermo Protocol definition, as:

Any person who uses coercion or deception, exploits someone else's vulnerable situation or, by any other such undue or improper means, recruits, transports, houses, receives or takes any such action involving a person, and thereby takes control of that person, with a view to that person being exploited for casual sexual relations or in some other way being exploited for sexual purposes. (Claude, 2010)

Sweden imposes a minimum of two years prison time to anyone convicted of trafficking and a maximum of ten years (the maximum allowed for any crime). However, human trafficking cases are particularly difficult to try in Sweden due to the fact that the law requires an element of control for the exploitation to be considered trafficking. The deputy chief prosecutor of the International Public Prosecution Office in Stockholm, Lise Tamm, states, “The fact that control has been exerted is difficult to demonstrate unless it’s possible to substantiate that the victim has, for example, been kept locked up” (Claude, 2010, p. 19). To address this issue, in 2010 the Swedish government successfully changed the legislation to remove the control requirement (Claude, 2010).

4. Effects of Policy

a. Effects on Prostitutes

Criminalizing the purchase of sexual services effectively pushes sex workers into an underground market. While sex workers themselves cannot be arrested for selling sex, their clients, by engaging in illegal behavior, are operating in a black market. Further, prostitutes are offered no protective regulations for their work. The only regulation they have access to is the law making the purchase illegal, but prostitutes do not often report their clients. According to a Swedish evaluation, from 1999 to 2004, only 734 purchasers were arrested, only 140 were convicted, and those convicted fined (Zeegers & Althoff, 2015). And of course, purchasers who might have witnessed abuse put themselves at legal risk if they were to come forward.

The Swedish law is also criticized by and on behalf of sex workers for excluding sex workers from a safe workplace. Since the purchase of sex work is illegal, many sex workers do not have a safe, neutral site to sell their services. In fact, sex workers often

cannot conduct business in their own homes or apartments, since landlords could be held liable for promoting prostitution, if prostitution is occurring on their property. This leads many sex workers to work from their clients' homes, causing a dangerous power imbalance, or, as noted recently, from rented spaces such as AirBnbs. According to Nadine Bergquist, a member of a Swedish group that assists prostitutes leaving the profession, staff at Swedish hotels are trained extensively to keep prostitutes out (Dyer, 2016).

Problems of safe access to places of work also exists in other countries using the Nordic Model. In Norway, for example, "Operation Homeless" led to the eviction of hundreds of prostitutes from their apartments after police targeted sex workers through online ads, found their homes, and threatened their landlords with charges. The operation officially was in force from 2007-2014, but even after it ended the problem of sex worker eviction continues (Grant, 2016).

In Ireland, where the purchase of sex is illegal but the sale is not, the underground prostitution market has led not only to prostitutes being denied police protection but also to prostitutes suffering abuse at the hands of the police (Reisenwitz, 2016). One study reported that nearly 30% of the abuse sex workers experience is from police officers (Reisenwitz, 2016). Not only are prostitutes fearful of reporting violence to the police, but the police are often the very clients who intimidate and threaten prostitutes to discourage them from reporting crimes of maltreatment.

b. Effects on the Sex Market

One of the goals of the Nordic Model is to decrease the number of buyers of sexual services (Mathieson, 2015), and many studies claim that prostitution rates have

decreased in Sweden. As Gunilla Ekberg reported in the 2004 article “The Swedish Law That Prohibits the Purchase of Sexual Services:

In 1999, it was estimated that 125,000 Swedish men bought about 2,500 prostituted women one or more times per year. Of these women, approximately 650 were street prostitutes. From 1999 until today, the number of women involved in street prostitution has decreased by at least 30% to 50%, and the recruitment of new women has come almost to a halt. It is estimated that the number of women in prostitution has decreased from 2,500 in 1999, before the Law came into force, to no more than 1,500 women in Sweden in 2002. (p. 1193)

However, these studies have been criticized for lacking empirical evidence. Empirical evidence on sex work is typically difficult to gather for all but street prostitution.

Specifically doubt has been cast on Sweden’s ability to collect data on sex purchases organized online. As discussed by Charlotta Holmström and May-Len Skilbrei (2017), citing data from The County Administrative Board of Stockholm,

There has been a marked increase in the number of escort ads aimed at men who buy sexual services from women in the period 2006-2014, when it increased from 304 to 6,965 ads. An increase in the number of ads primarily targeted at the LGBT community has also been observed. In the period 2010-2014, the number rose from 190 to 702 ads. (p. 90)

As the Internet has become more secure and ubiquitous, sex work can be more easily and clandestinely organized online. Researchers, however, have primarily collected data on street prostitution as it is easier to track and quantify.

Despite these shortcomings, Gunilla Ekberg, who served as the Swedish Ministry of Industry expert on prostitution and human trafficking from 2002 to 2006, still believes the law has been effective at decreasing the rates of men purchasing sexual services. According to an official report by Ekberg (2012), “in 2008, only 7.8% of Swedish men had purchased someone for prostitution purposes compared to 13.6% of Swedish men prior to the coming into force of the legislation” (p. 6). While the survey work ensured respondents of their anonymity, it is still reasonable to question whether respondents were comfortable answering honestly. The results of this study are often cited as evidence for the success of the Nordic Model, but little detail is offered by Ekberg regarding the survey’s methodology.

c. Effects on Sex Trafficking

Another goal of the Nordic Model is to decrease the pervasiveness of sex trafficking and the overall population of victims. Like tracking prostitution, tracking the rates of human trafficking is difficult, especially sex trafficking. The data that exists does indicate the Swedish model has worked to decrease human trafficking rates. In a study published by *World Development*, economists Seo-Young Cho, Axel Dreher, and Eric Neumayer extensively analyze data on human trafficking in countries throughout the world. Very few countries adhere to the Nordic Model, but the countries that do have decreased rates of human trafficking compared to others. In fact, the study’s findings indicate that:

- (1) Countries that have legalized sex buying are associated with higher human trafficking inflows than countries where sex buying is prohibited; (2) evidence indicates that the criminalization of sex buying in Sweden resulted in the

shrinking of the prostitution market and a decline in human trafficking inflows; and (3) cross-country comparisons of Sweden (where sex buying is criminalized) with Denmark (where sex buying is decriminalized) and Germany (where sex buying is legalized) are consistent with the quantitative analysis, which show that trafficking inflows decreased with criminalization of sex buying and increased with legalization or decriminalization of sex buying. (Mathieson, 2015, p. 388-389)

This study and others like it are criticized for overlooking the varying definitions of trafficking among countries, especially the differences in developing versus developed countries. Even with these discrepancies in mind, the data comparing Sweden, Denmark, and Germany still stand as those countries share roughly the same definitions of human trafficking.

d. Other Concerns

Due to the legal status of sex work under the Nordic Model, sex work is not heavily regulated. While prostitutes cannot be criminally charged for their work, they also do not have access to many protections provided in countries where sex work is legal. Most notably, sex workers are not required to complete any STD testing. Not only are sex workers not required to take these tests, many sex workers do not seek these services on their own due to fear of judgment. A study by Edlund and Jakobsson found that many Swedish sex workers are not confident in, and are hesitant to contact health services. When sex workers do seek health services, they often fear disclosing their involvement in the sex market.

5. Opinions

a. Opinions of Public

One of the goals of the Nordic Model was to move the public's judgment from sex workers to those who purchase sex. Data indicates that the Swedish law has shifted the perception of blame from sex workers to the buyers. In a 1996 Swedish study, 32% of respondents believed that a man buying sex should be treated as a criminal and 67% did not. However, by 1999, 76% supported criminalizing the purchase of sexual services. In 2008, respondents were asked if the law should remain in place; 70% of respondents supported keeping the law (Holmström & Skilbrei, 2017).

b. Opinions of Sex Workers

One of the biggest concerns for sex workers is their sense of trust in law enforcement agencies. Because sex work is not fully legally protected, sex workers can experience problems with law enforcement. The National Board of Health and Welfare found that “due to the ban, sex workers feel less trust in social authorities, police and the legal system” (Zeegers & Althoff, 2015, p. 370). In particular, the study reported that sex workers are not comfortable contacting the police with issues because “sex workers feel haunted by them, and are subjected to invasive searches and questioning. The unclear legal position is also seen as problematic: they can be made to testify in a trial but they neither enjoy the rights of the accused nor of the victim” (p. 370).

However, other studies report that sex workers now have an increased feeling of safety. In a study conducted by Jay Levy, “Criminalizing the Purchase of Sex, Lessons from Sweden,” sex workers and social workers actually report more positive encounters with the police. Some sex workers feel an increased sense of safety as they can threaten

non-compliant or abusive clients with police action. If a client refuses to pay, for example, sex workers can report the client to the police (Holmström and Skilbrei, 2017).

6. Conclusion

Since Sweden decriminalized the selling of sex, other countries have followed. While these policies are not perfect, the Nordic Model does create a safer environment for sex workers compared to those working under total prohibition. Sweden's policies reflect the notion that the majority of sex workers are victims of some form of exploitation and should therefore not fear prosecution. These policies open the door for substantive research regarding the sex work industry, specifically the forces that cause individuals to work in the industry. The Nordic Model allows for research while not requiring countries to regulate the industry, like in Germany. Additionally, the Nordic Model proves promising at deterring rates of sex trafficking.

Chapter 7: Discussion and Policy Recommendations

Throughout this study, it has become clear that there is no one policy option that successfully removes or even alleviates all the various risks created through the exchange of sexual services for pay. Despite prostitution's extensive history, the correct way to administer policy on the issue has remained uncertain. In this section, I will discuss the various challenges to creating effective prostitution policy by comparing the information gained from the literature review and case studies. Based on this information, I will recommend a course of action for the United States based on the following goals: recognizing sexual autonomy, protecting vulnerable people from violence and exploitation, and decreasing the market for sex traffickers. My policy recommendation will be based on its ability to achieve those goals, after which I will consider its political feasibility.

1. Germany's Model

Germany's prostitution laws starting in 2002 illustrate a system that fully recognized sexual autonomy, allowing both the purchase and sale of sexual services. However, these rights were curtailed with the passage of the Prostitution Protection Act, which requires an extensive amount of regulatory procedures to be completed by sex workers. It is understandable that Germany would increase regulations from the law's starting point in 2002. Migration patterns, refugee crises, and the growth of the European Union all have contributed to conditions that make individuals more susceptible to exploitation in the German sex market.

As Hendrik Wagenaar and Sietske Altink argue in their article, “Prostitution as Morality Politics or Why It Is Exceedingly Difficult To Design and Sustain Effective Prostitution Policy,” it is exceedingly difficult to make policy regarding prostitution because data is not easily collected about sex work. These issues are only heightened with influxes of immigrants and unstable migration patterns throughout the western European Union. The new regulations in the Prostitute Protection Act provide greater opportunity for data collection about sex workers in Germany, but at the cost of often punishing the most vulnerable workers or forcing them into an underground market.

As noted in the case study, many sex workers in Germany do not have the information needed to register as a prostitute, as they are often immigrants or refugees. As authors Wagenaar and Altink point out, sex work is often pursued by recent migrants upon entry to a country because it is one of the only forms of work readily available. This situation should be considered in terms of philosopher Martha C. Nussbaum’s argument in “Whether From Reason or Prejudice’: Taking Money For Bodily Services.” Nussbaum believes that the most important way to protect vulnerable people from exploitation through sex work is to ensure individuals have access to education and various forms of work. Nussbaum recommends that policy makers focus not on inhibiting prostitution, but on creating access to other work options, financial security, and education.

In an attempt to protect vulnerable populations from exploitive work, Germany increased regulations that ultimately inhibit sex workers’ ability to work freely and safely. The effects of the most recent changes in Germany’s law cannot be accurately quantified as sex workers currently still fall under the law’s grace period, but the

regulations are expected to have negative consequences (Herter and Fem, 2017). Workers who cannot complete registration are likely to fall outside of the protection of the law and become more vulnerable to exploitation in their work.

2. Nordic Model

The Nordic Model offers a unique approach that attempts to deter exploiters rather than sex workers. While the model does not fully recognize the right to sexual autonomy, its approach could prove more beneficial for the long term future of prostitution policy by facilitating better data collection on sex work. In the United States, the data that exists regarding human trafficking is mainly collected through the national trafficking hotline, and is generally understood to be inaccurate and incomplete. Additionally, the United States has no reliable data regarding the size of the sex work market of workers not victim to trafficking. Sex workers in Sweden, however, are more likely to discuss their work with police or researchers as they are protected from criminal prosecution.

Unlike Germany and other countries where prostitution is fully legalized, Nordic countries like Sweden present a less attractive destination for sex traffickers. Even compared to the United States, where victims of trafficking are often criminalized and thus less likely to contact authorities, sex trafficking can be more safely reported in Sweden. Granted, sex trafficking remains a problem in Nordic Model countries, but the model creates an environment where a sex worker has the upper hand compared to customers or traffickers.

One of the main problems with the Nordic Model, similar to Germany, stems from over-regulation. Specifically, the Nordic Model too broadly categorizes the

promotion of prostitution. The regulations that punish landlords when sex work occurs on their property inappropriately punish and lead to further problems for sex workers. These regulations have led sex workers to face the constant fear of eviction and forced them to conduct business in their clients' homes or in AirBnbs. Many sex workers in Nordic countries have expressed their problems with these restrictions and their wish to conduct their work in their own homes (Amnesty International, 2017). By doing so, sex workers can ensure a level of comfort and control.

3. Policy Recommendations

The United States has consistently addressed sex work and sex trafficking by punishing sex workers over customers and, in some cases, traffickers (Mathieson, 2018). As pointed out by Rebecca Hayes-Smith and Zahra Shekarkharb in the article, "Why is Prostitution Criminalized? An Alternative Viewpoint on the Construction of Sex Work," politicians have advocated tougher crackdowns on prostitution in an attempt to look tough on crime instead of fully acknowledging the various ways sex workers are victimized. This reality is discussed in Hila Shamir's 2012 article, "A Labor Paradigm for Human Trafficking," which argues:

From 2001 to 2008, under Bush administration and under pressure from a coalition of evangelical Christians, neoconservatives, and radical feminists, the TIP report regularly conflated trafficking with prostitution and, therefore, classified steps taken toward the criminalization of prostitution as anti-trafficking measures. (p. 92)

Instead of recognizing the multifaceted issues of trafficking and exploitive sex work, American policy makers have addressed issues by more harshly pursuing sex workers.

In addition to failing to protect victims, the United States fails to recognize any autonomy for the buying and selling of sexual services. This approach forces willing workers into a dangerous underground market and creates a market for sex traffickers to exploit victims. These conditions also make it extremely difficult for accurate data regarding trafficking and prostitution to be collected.

With the United States' history and longstanding attitudes towards prostitution, full legalization is unlikely to be achieved in the near future. However, the United States could begin to shift its focus from the investigation and punishment of sex workers to the punishment of customers and traffickers. This can be achieved by cities and states adjusting their policies regarding prostitution and shifting the way they police sex work. In the city of Seattle, prostitution remains illegal, but the laws have changed significantly to favor sex workers and punish customers and traffickers. Seattle became a popular site for traffickers from Canada, and the influx of victims cause the city to reconsider their policies regarding sex work (Mathieson, 2015).

While Seattle's approach is commendable, without a cohesive national approach, little change in United States' systems can be truly achieved. The United States government must recognize its utter lack of reliable data regarding sex work and sex trafficking and adjust its policies in a way that allows avenues of information gathering to be opened. If the United States expects to obtain accurate data on sex work, it must adopt a policy that decriminalizes prostitution. Even victims under the age of eighteen are criminalized and jailed in the United States, a reality that silences victims more than addressing the real issues of trafficking or exploitive sex work. In 2012, the State Department reported that 136 males and 443 females were arrested as minors engaging in

prostitution (Romero, 2014), despite the fact that children engaged in prostitution are legally considered victims of exploitation.

Along with decriminalizing prostitution, the United States ought to recognize the problems with Germany's policy and the Nordic Model. Specifically, the United States ought to enhance its existing government programs and partnerships with nonprofits to ensure that sex workers have avenues available to leave sex work. This involves ensuring equal access to education and fair wages in other professions. There are willing sex workers, but evidence shows that there are many more exploited or trafficked victims who are forced into sex work. Those forced and trafficked are often women who do not have access to other forms of labor. Women who lack education, are refugees, runaways, or victims of domestic violence are preyed on by traffickers (“The Victims”, 2014). Currently, the United States does not offer victims a way to escape their exploiters or seek alternative professions.

Due to refugee crisis and the expansion of the European Union, workers fled to Germany where prostitution was legal and under regulated, causing problems in the sex market. Germany’s attempt to address these issues has been met with significant criticism. Because there lacks consensus regarding proper regulation of the sex market and due to the lack of political feasibility of fully legalizing prostitution, the United States’ policy makers ought to first prioritize decriminalizing the sale of sex. By doing so, United States can shift its focus to punishing traffickers and gathering accurate data on the extent of sex work, both exploited and consenting.

Chapter 8: Conclusion

Unfortunately, there is currently no prostitution policy in place without significant drawbacks and criticism. Still, the United States' current approach to regulating prostitution is significantly flawed and harms sex workers more than other guilty party. Fully criminalizing prostitution is not recommended by various international organizations including the United Nations and Amnesty International. Despite these recommendations and the downfalls of full criminalization, there has been little to no discussion of changing the policy in the United States. The crimes associated with sex trafficking and prostitution often do not make headlines or affect populations outside of the sex market. However, as information campaigns regarding human trafficking throughout the United States become more ubiquitous, activists and policy makers will hopefully become more aware of issues existing in the sex market.

One of the biggest and most consistent struggles researching this topic was the lack of reliable empirical data regarding consensual prostitution and the underground sex trafficking market. Even in European countries, the migration patterns of European sex workers and lack of consistency in prostitution policies across the region make data collection extremely difficult. The United States, unlike Europe, could have a better opportunity to gather data on sex work as the United States borders are not nearly as open as countries within the European Union. However, as long as prostitution is criminalized in the United States, it is not likely that there will be an opportunity for accurate data collection.

In addition to gathering accurate data, for successful prostitution policy to be created, there must be an avenue for sex workers to openly discuss their experiences in the industry. Sex work policy should be crafted to best protect sex workers while avoiding impractical regulations. Since sex workers in the United States are marginalized, judged by society, and criminalized, sex workers do not have a platform to lobby for change. By decriminalizing prostitution and creating avenues for sex workers to recommend policy, the United States policy makers could create holistic change in the sex industry.

While sex workers do not have a platform to lobby for change in the United States, advocates for juvenile and sex trafficking victims do. There has been increased attention brought by advocates to the sex trafficking industry existing in the United States, and many advocates have already brought these issues to the attention of

Congress. The research I conducted and that has been conducted by numerous scholars draws attention to the inherent flaws of the total criminalization of prostitution. Victims of trafficking still have reason to fear prosecution for selling sex as long as our laws remain the same. Advocating for an end to sex trafficking should be connected with advocacy for the decriminalization of sex work. A change in laws could open the doors for further research into the sex work industry—for victims of trafficking and consenting actors.

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